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Nos. 89-196 and 89-394

Supreme Court, U.S.

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JOSEPH F. SPANIOL, JR.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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RAILROAD COMMISSION OF TEXAS, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

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WALKER OPERATING CORPORATION, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

---

*ON PETITIONS FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT*

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**BRIEF FOR THE FEDERAL ENERGY REGULATORY  
COMMISSION IN OPPOSITION**

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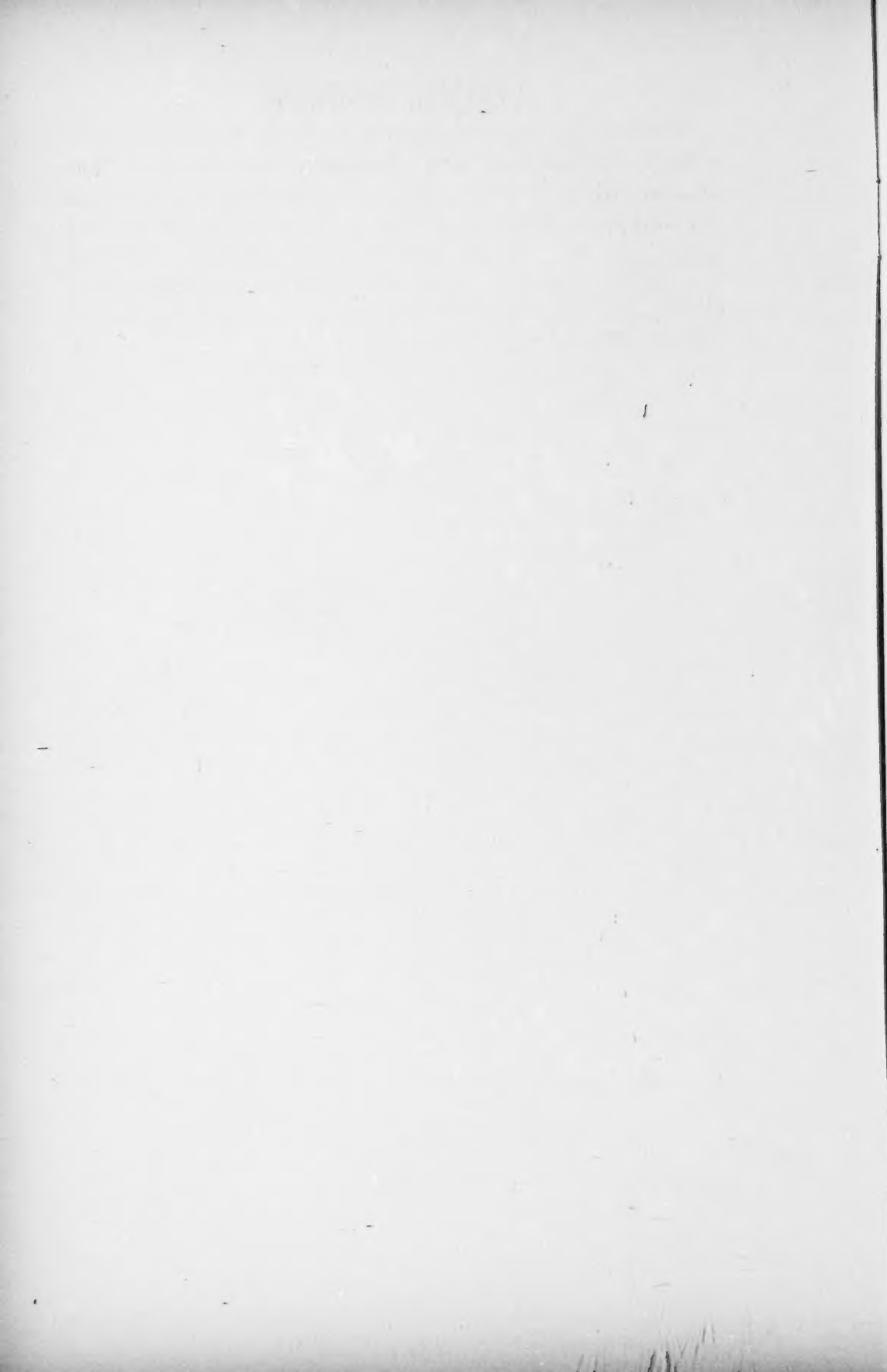
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### **QUESTION PRESENTED**

Whether the court of appeals properly upheld the decision of the Federal Energy Regulatory Commission that certain oil well operators had diverted natural gas dedicated to interstate commerce, in violation of Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), and sold that gas at a price in excess of the lawful maximum price, in violation of Section 504(a)(1) of the Natural Gas Policy Act of 1978, 15 U.S.C. 3414(a)(1).



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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A41)<sup>1</sup> is reported at 874 F.2d 1320. The order of the Federal Energy Regulatory Commission (Pet. App. B1-B17) is reported at 32 F.E.R.C. ¶ 61,043. The order of the Federal Energy Regulatory Commission on rehearing (Pet. App. C1-C36) is reported at 33 F.E.R.C. ¶ 61,207.

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<sup>1</sup> "Pet. App." refers to the appendix to the petition in No. 89-196.

## JURISDICTION

The judgment of the court of appeals was entered on April 28, 1989. The petitions for a writ of certiorari were each filed on July 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case involves challenges to an order issued by the Federal Energy Regulatory Commission determining that certain oil well operators had diverted natural gas dedicated to interstate commerce, in violation of Section 7(b) of the Natural Gas Act (NGA), 15 U.S.C. 717f(b), and sold that gas at a price in excess of the lawful maximum price, in violation of Section 504(a)(1) of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3414(a)(1).

1. a. The Natural Gas Act, 15 U.S.C. 717 *et seq.*, reflects a segmented scheme of regulation, consisting of production and gathering at one end, interstate transportation and sale in interstate commerce for resale in the middle, and local distribution at the other end. See 15 U.S.C. 717(b). The NGA gives the Commission comprehensive regulatory authority over the "middle segment, with production on one end and distribution on the other committed to the control of different states." *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 488 (1950) (Jackson, J., dissenting).

Within the "middle segment," the Commission regulates the natural gas market through its authority under Section 7(e) of the NGA, 15 U.S.C. 717f(e), to issue certificates of public convenience and necessity authorizing natural gas producers to transport or sell gas in interstate commerce. Under Section 7(b) of the NGA, 15 U.S.C. 717f(b), the Commission's issuance of a certificate "commits" or "dedi-

cates" gas covered by the certificate to the interstate market, such that the certificate holder must continue to supply gas to that market unless the Commission grants permission to abandon certificated service. See, e.g., *United Gas Pipe Line Co. v. McCombs*, 442 U.S. 529, 536 (1979). In addition, under Sections 4 and 5 of the NGA (15 U.S.C. 717c and 717d) the Commission regulates the price and other terms of sales for resale and of transportation, ensuring that the rates and charges for such services, as well as all rules, regulations, practices, and contracts affecting those rates and charges, are just and reasonable (see 15 U.S.C. 717c(a)). See also *Northwest Central Pipeline Corp. v. State Corporation Comm'n*, 109 S. Ct. 1262, 1271-1272 (1989).

b. In 1978 Congress adopted the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*, "to give market forces a more significant role in determining the supply, the demand, and the price of natural gas." *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986). The NGPA set new, higher price ceilings for "new" or hard-to-produce gas as an incentive to production, and eliminated, over time, FERC's jurisdiction over the wellhead price of that "new" gas. See Section 103 of the NGPA, 15 U.S.C. 3313.<sup>2</sup> However, "old" gas, *i.e.*, gas already "committed or dedicated to interstate commerce" when the NGPA was enacted and not otherwise excluded from federal regulation under Section 601(a)(1)(B) of the NGPA, 15 U.S.C. 3431(a)(1)(B), remains subject to the price ceilings established under the NGA, as well as the abandonment requirements of Section 7. See Section 104 of the NGPA, 15 U.S.C. 3314.

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<sup>2</sup> "New" gas covered by the higher ceiling prices (and not subject to the dedication and abandonment requirements of the NGA) includes gas produced from new onshore wells drilled after February 19, 1977. See Section 103(c) of the NGPA, 15 U.S.C. 3313(c).



The NGPA specifically prohibits the sale of natural gas "at a first sale price in excess of any applicable maximum lawful price." Section 504(a)(1) of the NGPA, 15 U.S.C. 3414(a)(1). In conjunction with the price control scheme, the NGPA denominates state regulatory agencies as "jurisdictional agencies," and charges them with the responsibility to determine the category for which a well qualifies under the NGPA. See Section 503 of the NGPA, 15 U.S.C. 3413. An applicant submits information to the jurisdictional agency, and the jurisdictional agency then transmits notice of its determination to FERC for review and approval.<sup>3</sup>

2. a. This case arises from the West Panhandle Field, which covers a vast hydrocarbon reservoir in the Texas Panhandle. This reservoir contains both oil-producing and gas-producing formations. Pet. App. A5.<sup>4</sup> Petitioner Railroad Commission of Texas (RCT) regulates oil and gas production in the West Panhandle Field. State well-spacing rules allow one oil well on every 10 acres (a 10-acre proration unit), but one gas well only on every 640 acres (a 640-acre proration unit). Given the formations in the West Panhandle Field, oil well operators must frequently drill through gas-bearing rock to reach the lower-lying oil deposits. Texas state law therefore distinguishes between the

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<sup>3</sup> In order to reject a jurisdictional agency's determination, FERC must make a preliminary finding that no substantial evidence supports that determination within 45 days of receiving notice, and must further make a final determination within 120 days of that finding. If FERC does not take the requisite actions within the 165-day period, the jurisdictional agency's determination becomes final. See Section 503(b)(1) of the NGPA, 15 U.S.C. 3413(b)(1).

<sup>4</sup> As a result, the same surface area may contain both oil and gas wells with separate parties owning the gas and oil production rights. Pet. App. D7.

production of gas from oil, as opposed to gas production from gas proration units. *Id.* at A6-A7.

Texas state law permits an oil operator to keep any "casinghead gas" he produces as a necessary byproduct of producing oil, *i.e.*, "any gas or vapor indigenous to an oil stratum and produced from the stratum with oil." Tex. Nat. Res. Code Ann. § 86.002(10) (Vernon 1978); see Pet. App. F17. The RCT, however, regulates drilling activity to ensure that oil well operators do not take "dry gas," *i.e.*, gas produced from gas-bearing rock, because such gas belongs to gas proration unit owners. Tex. Nat. Res. Code Ann. §§ 86.002(7), 86.097 (Vernon 1978); see Pet. App. F16, F27. In order to enforce this regulatory scheme, the RCT, since 1933, has required all Texas oil well operators to establish the line of contact between their oil wells and gas-bearing rock formations (known as the "gas-oil contact"), and to perforate their oil wells only *below* the gas-oil contact. *Id.* at D8 (citing Texas Statewide Rule 13(b)(4)).

b. In 1983, FERC's enforcement staff launched a preliminary investigation of natural gas sales by certain oil operators in the West Panhandle Field. As a result, in February 1984, the Commission issued an order initiating a show cause proceeding. The order identified 37 oil well operators in the West Panhandle Field, 35 of whom are petitioners in this case (see note 6, *infra*), whose 196 oil wells were located below the same surface acreage as 35 gas wells from which Dorchester Gas Producing Company sold natural gas for resale in interstate commerce. Pet. App. A8.

Dorchester sold its gas under the terms of a certificate of convenience and necessity that FERC had issued in 1954 under Section 7(b) of the NGA, 15 U.S.C. 717f(b). As a result, most of Dorchester's gas qualified as "old" gas for purposes of the pricing provisions of Section 104 of the

NGPA, 15 U.S.C. 3314.<sup>5</sup> In May 1984, Dorchester's gas sales price under Section 104 was 46 or 47 cents per thousand (MM) Btu. Pet. App. D9-D11. On the other hand, almost all of petitioners' oil wells were completed after November 9, 1978, the effective date for the NGPA. *Id.* at D12. As a result, under Section 503 of the NGPA, 15 U.S.C. 3413, the RCT determined that "casinghead gas" produced from petitioners' oil wells qualified for sale as "new" gas under Section 103 of the NGPA, 15 U.S.C. 3313. Petitioners consequently sold the gas produced by these wells subject to a higher ceiling price, which, in May 1984, was \$2.899 per MM Btu. Pet. App. D12-D13.

FERC's show cause order alleged that there was reason to believe that petitioners were perforating their wells above the gas-oil contact in the gas-bearing formations owned by Dorchester. The Commission's order further alleged that petitioners were diverting gas from Dorchester's gas proration units for sale in both intrastate and interstate commerce as "new" gas under the higher price ceilings established by Section 103 of the NGPA, despite the fact that Dorchester's gas units had been dedicated for sale in interstate commerce under the Commission's certificate of public convenience and necessity, subject to the price ceilings of "old" gas under Section 104 of the NGPA. Pet. App. A8-A9, D24-D26.

3. After an evidentiary hearing, the administrative law judge, in January 1985, issued a recommended decision, concluding that petitioners had diverted natural gas dedicated to interstate commerce, in violation of Section 7(b) of the Natural Gas Act of 1978, 15 U.S.C. 717f(b), and

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<sup>5</sup> Sales from 20 of Dorchester's wells are regulated under Section 104 of the NGPA. Sales from the remaining 15 are regulated as "stripper wells" under Section 108 of the NGPA, 15 U.S.C. 3318, because of their declining production.

sold that gas at a price in excess of the lawful maximum price, in violation of Section 504(a)(1) of the Natural Gas Policy Act, 15 U.S.C. 3414(a)(1). Pet. App. D1-D71.<sup>6</sup>

The ALJ reviewed Dorchester's certificate of public convenience and necessity and the pertinent contracts that formed the basis of FERC's issuance of that certificate. These documents confirmed that all gas produced from Dorchester's reserves, except "casinghead gas," had been dedicated to interstate commerce. Pet. App. D55-D60. The ALJ then found that most of the gas petitioners claimed to be "casinghead gas" was in fact "dry gas" which otherwise would have been produced by Dorchester. *Id.* at D62-D63. In so finding, the ALJ followed Texas state law, which defined "casinghead gas" as "any gas and/or vapor indigenous to an oil stratum and produced from the stratum with oil." Pet. App. D60. Since the evidence showed that petitioners were producing gas from above the gas-oil contact, *i.e.*, were producing "dry gas" as opposed to "casinghead gas," and that petitioners were selling this gas as "new" gas under the higher ceiling prices of the NGPA, the ALJ concluded that petitioners were violating both the NGA and NGPA. *Id.* at D65-D69.

4. In an order issued on July 12, 1985, the Commission adopted the recommended decision of the ALJ "in its entirety, including all findings of fact and conclusions of law." Pet. App. B14. Accordingly, the Commission ordered petitioners immediately to "cease and desist from selling natural gas from their wells on the acreage subject

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<sup>6</sup> The ALJ found that 35 of the 37 named oil well operators had violated the NGA and/or the NGPA. She found that the evidence against the remaining two operators was inconclusive and required further investigation. Pet. App. A8. Only the 35 operators found to have violated federal law sought review before the court of appeals and are petitioners, along with the RCT, in this case. See *id.* at A9.

to this proceeding in the Panhandle West Gas Field." *Id.* at B15.<sup>7</sup>

In an order issued on November 13, 1985, the Commission denied petitioners' motions for a stay and requests for rehearing. Pet. App. C1-C36.

5. The court of appeals (Pet. App. A1-A41) denied petitions for review of the Commission's order filed by both the oil well operators and the RCT. The court first rejected petitioners' contention that the Commission had exceeded its jurisdiction. The court concluded that the Commission's actions did not impermissibly trench on state regulatory prerogatives under the NGA and the NGPA, particularly where, as here, the Commission must examine local well completion and perforation practices in order to determine whether gas producers are complying with those federal statutes. *Id.* at A15-A22. In a similar vein, the court dismissed petitioners' claim that the Commission, under the reasoning of *Burford v. Sun Oil Co.*, 319 U.S.

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<sup>7</sup> The Commission also disposed of various procedural objections raised by individual petitioners that are no longer at issue. Pet. App. B6-B8.

With respect to the RCT's earlier request that the Commission stay its proceedings in order for the RCT to resolve certain potentially relevant state law issues, the Commission observed that steps taken by the RCT, including the issuance of a memorandum and letter to operators in the West Panhandle Field, together with applicable Texas statutes and field rules, confirmed that the Commission's decision was fully consistent with state law, and thus rendered a stay inappropriate. See Pet. App. B8-B13.

Finally, the Commission remanded the case to the ALJ for separate hearings regarding an appropriate remedy for petitioners' statutory violations. Pet. App. B15. After the court of appeals issued its decision, the Commission entered its remedial order requiring petitioners to pay monetary damages and restitution. See *Stowers Oil & Gas Co.*, 44 F.E.R.C. ¶ 61,128, on reh'g, 48 F.E.R.C. ¶ 61,230 (1989), appeal pending, *Northern Natural Gas Co. v. FERC*, No. 89-1512 (D.C. Cir.) (filed Aug. 24, 1989).



315 (1943), should have abstained from exercising its jurisdiction. As the court explained, the Commission "was clearly acting within its jurisdiction, and it was taking Texas statutes and regulatory determinations at their face value. A *federal* regulatory issue was the issue before FERC. This is not *Burford*, and FERC was not required to have deferred." Pet. App. A22-A23 (emphasis in original).

Turning to the merits of the Commission's order, the court of appeals found that there was "extensive evidence" supporting the determinations that petitioners "were producing gas from above the gas-oil contact," Pet. App. A24-A25, that this gas, which did not qualify as "casing-head gas" under Texas state law, had already been dedicated for sale in interstate commerce by virtue of Dorchester's certificate of public convenience and necessity, and that the gas thus could not be sold as "new" gas under the NGPA. *Id.* at A25-A31.

The court of appeals also rejected petitioners' contention that the Commission's decision impermissibly conflicted with the RCT's previous determination that petitioners' wells qualified for "new" gas status under Section 103 of the NGPA. In the court's view, the Commission had correctly determined that the RCT's Section 103 designations applied only to gas that was in fact "casinghead gas" from oil proration units, not to "dry gas" previously dedicated to interstate commerce. Pet. App. A31-A39.

Lastly, the court of appeals dismissed petitioners' claim that the Commission's show cause order "did not give them adequate notice of the theory under which FERC would proceed." Pet. App. A40. After reviewing the show cause order, the court concluded that it adequately notified petitioners that the concept of the gas-oil contact could become relevant in the proceedings. *Id.* at A41.

### ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioners renew their contention (89-196 Pet. 16; 89-394 Pet. 9-10) that the Commission has exceeded its jurisdiction by trespassing on the States' exclusive authority to regulate "the production or gathering of natural gas" under Section 1(b) of the NGA, 15 U.S.C. 717(b). Congress, however, has vested the Commission with exclusive authority to enforce both the NGA and NGPA with respect to wellhead pricing and interstate sales of natural gas. See 15 U.S.C. 717 and 15 U.S.C. 3411. That is precisely what the Commission's order in this case accomplished; as the court of appeals explained, "[t]he Commission here was regulating the price ceilings of sales of natural gas in interstate commerce." Pet. App. A16. And, to the extent petitioners seek a safe harbor in the production or gathering exception of Section 1(b) of the NGA, that effort must fail. This Court has previously held that "sales in interstate commerce for resale by producers to interstate pipeline companies do not come within the 'production or gathering' exemption." *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 680-681 (1954).

For similar reasons, the RCT (89-196 Pet. 15-16) errs in relying on decisions such as *Panhandle Eastern Pipe Line Co. v. TXO Prod. Corp.*, 34 F.E.R.C. ¶ 61,292, reh'g denied, 36 F.E.R.C. ¶ 61,182 (1986), and *Shell Oil Co. v. FERC*, 566 F.2d 536 (5th Cir. 1978), aff'd by an equally divided Court, 440 U.S. 192 (1979). In *Panhandle Eastern Pipe Line*, the Commission held that it lacked jurisdiction to prevent drainage of gas from a dedicated lease when actions in a non-dedicated adjoining lease (over which FERC

had no jurisdiction) caused such drainage. 34 F.E.R.C. ¶ 61,292, at 61,525. Here, by contrast, petitioners were withdrawing gas directly from Dorchester's dedicated lease — a lease plainly subject to the Commission's jurisdiction by virtue of the certificate of public convenience and necessity issued in 1954. And in *Shell Oil*, the Fifth Circuit overturned a Commission order assuming jurisdiction over production matters such as well completions. 566 F.2d at 539-541. In these proceedings, however, the Commission examined well completion practices only in the context of deciding the ultimate issues of interstate pricing and sales. Indeed, petitioners remain free to produce their oil and gas subject only to state law restrictions. The Commission held only that the gas they produce must be sold in accord with federal law.

2. Petitioners further claim (89-196 Pet. 17-20; 89-394 Pet. 10) that the Commission's order subjects oil operators to conflicting federal and state standards. According to petitioners, the Commission's application of a "rigid" gas-oil contact standard to determine whether gas is "dry" or "casinghead" conflicts with the RCT's more flexible approach that takes into account the gas-oil contact and other factors. However, the asserted conflict does not exist. As the court of appeals made plain (Pet. App. A28-A29), the Commission's decision followed settled Texas state law with respect to the treatment of the gas-oil contact in distinguishing between "dry" and "casinghead" gas.

Since 1933, the RCT has required all Texas oil well operators to establish the line of contact between their oil wells and gas-bearing rock formations (the "gas-oil contact"), and to perforate their oil wells only *below* the gas-oil contact. Pet. App. D8 (citing Texas Statewide Rule



13(b)(4)).<sup>8</sup> Here, the record shows that petitioners had extracted gas from the zone above the gas-oil contact. Indeed, the Commission specifically found that after petitioners had drilled their oil wells they made new perforations into gas-bearing rock. See, e.g., Pet. App. D66-D67.

The Commission also applied express state law definitions in determining that the gas petitioners produced was "dry" gas, not "casinghead" gas. Under Texas law, gas produced from gas-bearing rock, "dry" gas, belongs to gas proration unit owners, not oil well operators. Tex. Nat. Res. Code Ann. §§ 86.002(7), 86.097 (Vernon 1978); see Pet. App. F16, F27. "Casinghead" gas, by contrast, which belongs to oil well operators, is "any gas or vapor indigenous to an oil stratum and produced from the stratum with oil." Tex. Nat. Res. Code Ann. § 86.002(10) (Vernon 1978); see Pet. App. F17.<sup>9</sup> Once again, substantial

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<sup>8</sup> The RCT, in a recent decision, Oil and Gas Docket No. 10-87,017, observed that well operators may have difficulty in identifying the precise location of the gas-oil contact in any given well and that a 50-foot transition zone may sometimes exist between the gas and oil horizons. See 89-196 Pet. 18-19. Despite these observations, the RCT has not repealed its longstanding rule requiring well operators to establish the gas-oil contact. See Pet. App. D8 (citing Texas Statewide Rule 13(b)(4)). Thus, FERC may not be faulted for following that settled state law practice.

<sup>9</sup> Indeed, the Texas Supreme Court, in an analogous setting, has recently acknowledged the Commission's proper construction of these state law provisions. See *Amarillo Oil Co. v. Energ-Agri Products, Inc.*, No. C-6649 (Mar. 8, 1989).

The RCT (89-196 Pet. 19) also claims that the Commission, in determining that petitioners were producing gas from the dry gas horizon, used the wrong gas-oil ratio. That claim is not presented here. The Commission used the gas-oil ratio only during the damages proceedings, which are currently pending before the District of Columbia Circuit. See *Stowers Oil & Gas Co.*, 44 F.E.R.C. ¶ 61,128, on reh'g 48 F.E.R.C. ¶ 61,230 (1989), appeal pending, *Northern Natural Gas Co. v. FERC*, No. 89-1512 (D.C. Cir.) (filed Aug. 24, 1989); note 7, *supra*.

evidence supports the Commission's determination that the gas produced from petitioners' oil proration units was not a byproduct of drilling, and thus could not qualify as "casinghead gas." See, *e.g.*, Pet. App. C14, D66-67; see note 10, *infra*.

3. Petitioners also contend (89-196 Pet. 20-23; 89-394 Pet. 11-13) that the Commission's order conflicts with the RCT's previous determination that petitioners' wells qualified for "new" gas status under Section 103 of the NGPA. As the court of appeals correctly recognized (Pet. App. A31-A39), however, since the NGPA permits a state jurisdictional agency to grant Section 103 status only to wells that are *not* in an existing proration unit at the time, see, *e.g.*, 15 U.S.C. 3313(c), the RCT's Section 103 determinations plainly could not have applied to Dorchester's preexisting gas proration units.

As the court of appeals explained:

Section 103 operates to prevent the petitioners from obtaining a section 103 price for natural gas produced from an existing Dorchester proration unit. The petitioners are entitled to a section 103 price for gas produced by their section 103 oil wells only when that gas is produced from their oil proration units and is therefore casinghead gas, that is gas "indigenous to an oil stratum and produced from the stratum with oil." Tex. Nat. Res. Code Ann. § 86.002(10). Such gas will be from below the gas oil contact and will not be part of Dorchester's dedicated reserves.

Pet. App. A38-A39. In other words, the Commission correctly "approached [the RCT's Section 103] determinations as administratively final \* \* \* and did not attempt to make new section 103 determinations \* \* \*. Instead, the

[Commission] undertook to ascertain [their] scope consistent with the federal statutory language." *Id.* at A21.<sup>10</sup>

4. Petitioners also renew their claim (89-394 Pet. 18-21) that the Commission's show cause order did not adequately notify them of the Commission's theory of liability, namely, that the gas-oil contact established the division between the gas-producing and oil-producing zones in the West Panhandle Field. As the court of appeals observed, "petitioners' contention overstates the case." Pet. App. A41. The Commission's show cause order, as the trigger to agency proceedings, must set forth the areas of inquiry. As such, the order does not limit the issues that parties may raise in those proceedings.

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<sup>10</sup> The record refutes the RCT's assertion (89-196 Pet. 19) that all the gas petitioners were extracting qualified as "casinghead" gas, *i.e.*, gas produced as a byproduct of oil drilling. The Commission specifically found that after petitioners had drilled their oil wells they made new perforations into gas-bearing rock. See Pet. App. D67. The Commission also found that, although Texas state law required well operators to find the gas-oil contact within each well, see *id.* at D8 (citing Texas Statewide Rule 13(b)(4)), "[s]everal [oil well operators] testified that they did not know or bother to ascertain where the gas-oil contact was in their particular wells." Pet. App. D66. Finally, the Commission credited testimony from geological and engineering experts that the gas produced by petitioners was not gas indigenous to an oil stratum and was not extracted from the stratum together with oil. See *id.* at D67. Accordingly, substantial evidence supports the Commission's decision that the gas was extracted from Dorchester's gas proration units and was not produced from petitioners' oil proration units as a byproduct of drilling. See *id.* at C14.

Petitioners assert (89-394 Pet. 17-18) that the Commission applied standards "retroactively" in this case when it determined that the gas at issue was Section 104 "dry" gas from Dorchester's gas proration units rather than Section 103 "casinghead" gas. That claim is meritless. The Commission's decision merely enforced previously established principles for determining the proper categorization of gas in the context of ensuring that gas is produced and sold in accord with federal law.

In this case, the show cause order, rather than presenting the Commission's theory of the case, explained that the Commission's proceeding would focus on allegations that "dedicated gas reserves have been and are being irrevocably drained from the interstate market and sold at unlawfully high rates." 26 F.E.R.C. ¶ 61,207 at 61,480 (1984). The order also made clear that it "neither makes findings of fact nor reaches conclusions of law with regard to the \* \* \* alleged acts and practices." *Ibid.* The order thus plainly notified petitioners that, at the scheduled proceeding, the parties would be free to explore any facts or legal theories relating to the potential violations. Under these circumstances, the court of appeals correctly concluded that "the show cause order set the inquiry broadly enough to encompass the concept of the gas-oil contact." Pet. App A41 (internal quotation marks and citation omitted).<sup>11</sup>

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<sup>11</sup> Contrary to petitioners' assertions (89-196 Pet. 23; 89-394 Pet. 10), the court of appeals correctly held that the Commission had no obligation, under the circumstances presented, to abstain from exercising its regulatory jurisdiction. First, the record shows that the Commission gave the RCT ample opportunity to take action on its own. See Pet. App. B8-B13 (recounting procedural history). Second, the Commission could no longer defer action once it became clear that petitioners were committing ongoing violations of federal law. Third, as explained above, the Commission's decision specifically took into account state law requirements and is fully consistent with state law. Finally, as the court of appeals observed, the Commission

was clearly acting within its jurisdiction, and it was taking Texas statutes and regulatory determinations at their face value. A federal regulatory issue was the issue before FERC. This is not *Burford* [*v. Sun Oil Co.*, 319 U.S. 315 (1943)], and FERC was not required to have deferred.

*Id.* at A23 (emphasis in original).

### CONCLUSION

The petitions for a writ of certiorari should be denied.  
Respectfully submitted.

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